

Order

Michigan Supreme Court
Lansing, Michigan

November 9, 2006

Clifford W. Taylor,
Chief Justice

ADM File Nos. 2002-34, 2002-44

Michael F. Cavanagh
Elizabeth A. Weaver
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Second Amended Administrative Order No. 2004-5

Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

Expedited Summary Disposition
Docket in the Court of Appeals

Pursuant to Administrative Order No. 2004-5, this Court adopted an expedited summary disposition docket in the Court of Appeals to take effect on January 1, 2005, and to expire on December 31, 2006. On December 21, 2005, Amended Administrative Order No. 2004-5 was adopted to take effect January 1, 2006. We now order that the expedited summary disposition docket continue in effect, as modified *infra*, for an additional one-year period to expire December 31, 2007~~twelve-month period~~.

Although the Court of Appeals has failed to meet the stated objectives for this pilot program during its existence, the Court is persuaded to approve the extension of the expedited summary disposition docket because the Court of Appeals Work Group (which consists of members of the Court of Appeals, Court of Appeals staff members, and members of the Appellate Practice Section) unanimously recommended the extension in anticipation that the newest recommended changes will permit the program to meet its goals. The Court of Appeals and members of the bar should not presume that this extension in any way signals the Court's intention to eventually make the program permanent, particularly if it does not meet its intended goal of reducing appellate delay in the Court of Appeals during this additional year of experimentation.

1. Applicability. This second amended administrative order applies to appeals filed on or after January 1, 2007~~6~~, arising solely from orders granting or denying motions for summary disposition under MCR 2.116. Unless otherwise removed by order of the Court of Appeals, these appeals shall ~~are to~~ be placed on an expedited appeal track under which they shall generally be briefed, argued, and disposed of within six months of filing. A motion to remove is required for a party to divert such an appeals to the standard appeal track.
2. Time Requirements. Appeals by right or by leave in cases covered by this second amended order must be taken within the time stated in MCR 7.204 or MCR 7.205. Claims of cross-appeal must be filed within the time stated in MCR 7.207~~14 days after the claim of appeal is filed with the Court of Appeals or served on the cross-appellant, whichever is later, or within 14 days after the clerk certifies the order granting leave to appeal.~~

3. Trial Court Orders on Motions for Summary Disposition. If the trial court concludes that summary disposition is warranted under MCR 2.116(C), the court shall render judgment without delay in an order that specifies the subsection of MCR 2.116(C) under which the judgment is entered.
4. Claim of Appeal—Form of Filing. With the following exceptions, a claim of appeal filed under this order shall conform in all respects with the requirements of MCR 7.204.
 - (A) A docketing statement is ~~will not be required as long as the case proceeds on the summary disposition track unless the case is removed by order before the filing of the appellant's brief.~~
 - (B) When the claim of appeal is filed, it shall be accompanied by:
 - (1) evidence that the transcript of the hearing(s) on the motion for summary disposition has been ordered, or
 - (2) a statement that there is no record to transcribe, or
 - (3) the stipulation of the parties that the transcript has been waived.

Failure to file one of the above three documents with the claim of appeal will *not* toll subsequent filing deadlines for transcripts or briefs. Sustained failure to provide the required documentation may result in dismissal of the appeal under MCR 7.201(B)(3), as long as the Court of Appeals provides a minimum 7-day warning.

5. Application for Leave—Form of Filing. An application for leave to appeal, or an answer to an application for leave to appeal, filed under this second amended administrative order shall conform in all pertinent respects with the requirements of MCR 7.205. At the time an application or an answer is filed, the filing party must provide the Court of Appeals with 5 copies of that party's trial court summary disposition motion or response, brief, and appendices.
6. Claim of Cross-Appeal. ~~Subject to the filing deadline contained in section 2, a~~ A claim of cross-appeal filed under this second amended administrative order shall conform in all ~~other~~ pertinent respects with the requirements of MCR 7.207. Upon the filing of a claim of cross-appeal in an appeal proceeding on the summary disposition track, the Court will remove the case from the track as provided in section 7, if it determines that the case is no longer appropriate for the track.

7. Removal from Summary Disposition Track. A party may file a motion, or the Court may act sua sponte, to remove ~~the~~ a case from the summary disposition track to the standard track.
- (A) Time to File. A motion to remove may be filed by any party at any time. ~~However, filing of the motion most closely in time to discovery of the basis for removal will maximize the likelihood that the motion will be granted.~~
- (B) Form. Motions to remove shall concisely state the basis for removal, and must be in the form prescribed by the Court of Appeals. ~~This form shall include a statement advising whether the appellee is expected to oppose the motion.~~ Factors that weigh in favor of removal include:
- (1) the length of one or more briefs exceeds 25 pages; removal of the case from the summary disposition track becomes more likely as the briefs approach the 35-page limit under section 9(C).
 - (2) the lower court record consists of more than 3 moderately sized files and more than 100 pages of transcripts from the relevant hearing(s) and deposition(s).
 - (3) there are more than four issues to be decided, and
 - (4) one or more of the issues are matters of first impression, including the first interpretation of a statute, or are factually or legally complex.
- (C) Fee. No fee is required for a motion to remove from the summary disposition track.
- (~~C~~-D) Answer. An answer to a motion to remove must be filed within 7 days after service of the motion. ~~If applicable, the answer should state whether the appellee is expected to file a claim of cross appeal.~~
- (~~D~~-E) Disposition. Motions to remove shall be liberally granted. Within 14 days after the filing of the motion to remove, the Court of Appeals shall issue an order disposing of the motion and setting the time for further filings, if any, in the case. The time for further filings in the case will commence on the date of certification of the order on the motion.

- (~~E~~F) Docketing Statement. If the case is removed from the summary disposition track before the filing of the appellant's brief, a docketing statement must be filed within 14 days after the date of certification of the order on the motion.
- (~~F~~G) Administrative Removal. The Court of Appeals will ~~may~~ remove a case from the summary disposition track ~~at any time~~, on its own motion, if it appears to the Court that the case is not an appropriate candidate for processing under this second amended administrative order. Such administrative removal may be made at any time, even after the parties' briefs are filed.
- (~~G~~H) Effect of Removal. If the Court of Appeals removes a case from the summary disposition track before the filing of the appellant's brief, the parties are entitled to file briefs in accordance with the time requirements and page limitations set forth in MCR 7.212. New or supplemental briefs shall not be permitted in cases removed from the summary disposition track after the filing of the parties' briefs except upon motion of a party and further order of the Court. ~~the order shall state whether, and the deadlines by which, the parties are entitled to file briefs in accordance with the time and page limitations set forth in MCR 7.212.~~

8. Transcript—Production for Purposes of Appeal.

(A) Appellant.

- (1) The appellant must order the transcript of the hearing(s) on the motion for summary disposition before or contemporaneously with the filing of the claim of appeal or application for leave to appeal, unless there is no record to transcribe or all parties to the appeal stipulate that the transcript is unnecessary.
- (2) Evidence that the transcript was ordered must be filed with the claim of appeal or application for leave to appeal. Appropriate evidence of the ordering includes (but is not limited to) the following:
 - (a) a letter to the specific court reporter requesting the specific hearing dates and enclosing any required deposit; or

- (b) an “Appeal Transcript, Demand, Order and Acknowledgment” form, or
 - (c) a Ccourt reporter or recorder’s certificate.
 - (3) If the transcript is not timely filed, the appellant or an appellee may file an appropriate motions with the Court of Appeals at any time. Avoiding undue delay in filing the motion under the circumstances of the case, and concisely stating the specific basis for it, will maximize the likelihood that the motion will be granted.
 - (4) If an appropriate motion is filed, the order disposing of such motion shall state the time for filing any outstanding brief(s).
 - (5) Absent an order of the Court of Appeals that resets the time, ~~and the appellant's brief will be due as provided in section 9(B)(1), regardless of whether the ordered transcript is timely filed., the time for filing the appellant's brief will commence on the date the claim of appeal was filed or the order granting leave was certified. In such event, the appellant's brief shall be filed within 56 days after the claim of appeal was filed or 28 days after certification of the order granting leave to appeal. See Section 9(B)(1).~~
- (B) Appellee.
- (1) If the transcript has been ordered by the appellant but is not filed by the time the appellant’s brief is served on an appellee, the appellee may file an appropriate motion with the Court of Appeals. Avoiding undue delay in filing the motion under the circumstances of the case, and concisely stating the specific basis for it, will maximize the likelihood that the motion will be granted.
 - (2) If an appropriate motion is filed, the order shall state the time for filing any outstanding appellee briefs.
- (C) Court Reporter. The court reporter or recorder shall file the transcript with the trial court or tribunal within 28 days after it is ordered by either the appellant or the appellee. The court reporter or recorder shall conform in all other respects with the requirements of MCR 7.210.

- (D) Transcript Fee. The court reporter or recorder shall be entitled to the sum of \$3.00 per original page and 50 cents per page for each copy for transcripts ordered in appeals processed under the expedited docket, if the transcript is filed within 28 days after it was ordered. If the court reporter or recorder does not file the transcript within 28 days after it was ordered, the rate will remain \$1.75 per original page and 30 cents per page for each transcript, as set by MCL 600.2543.

9. Briefs on Appeal.

- (A) With the following exceptions, the parties' briefs shall conform to the requirements of MCR 7.212.
- (B) Time For Filing.
 - (1) In appeals by right, the appellant's brief shall be filed within 56 days after the claim of appeal is filed, or as ordered by the Court. In appeals by leave, the appellant's brief shall be filed within 28 days after the order granting leave is certified, or as ordered by the Court. In appeals by leave, the appellant may rely on the application for leave to appeal rather than filing a separate brief by timely filing 5 copies of the application for leave to appeal with a new cover page indicating that the appellant is relying on the application in lieu of filing a brief on appeal. The cover page should indicate whether oral argument is requested or is not requested. MCR 7.212(C)(1).
 - (2) The appellee's brief shall be filed within 28 days after the appellant's brief is served on the appellee, or as ordered by the Court. In appeals by leave, the appellee may rely on the answer to the application for leave to appeal rather than filing a separate brief by timely filing 5 copies of the answer to the application for leave to appeal with a new cover page indicating that the appellee is relying on the answer to the application in lieu of filing a brief on appeal. The cover page should indicate whether oral argument is requested or is not requested. MCR 7.212(C)(1) and (D)(1).
 - (3) Time for filing any party's brief may be extended for 14 days on motion for good cause shown, ~~filed within the original brief filing period.~~ If the motion is filed by the appellant within the original brief-filing period, the motion will toll the time for any sanctions for untimely briefs. A motion may include a statement from opposing counsel that counsel does

not oppose the 14-day extension. A motion to extend the time for filing a brief will be submitted for disposition forthwith; opposing counsel need not file an answer.

- (4) If the appellant's brief is not filed within 7 days after the date due, the Court of Appeals shall issue an order assessing costs and warning the appellant that the case will be dismissed if the brief is not filed within 14-7 days after the clerk's certification of the order deadline. If the brief is not filed within that 14-7-day period, the Court of Appeals shall issue an order that dismisses the appeal and that may assess additional costs.
 - (C) Length and Form. Briefs filed under this second amended administrative order are limited to 35 pages, double-spaced, exclusive of tables, indexes, and appendices. At the time each brief is filed, the filing party must provide the Court of Appeals with that party's trial court summary disposition motion or response, brief, and appendices. Failure to file these documents at the time of filing the appellant's brief will not extend the time to file the appellee's brief, ~~however. Provided such omission is noted appropriately in the appellee's brief, the appellee may omit these appendices if they were included with the appellant's brief.~~ If the appellant filed copies of the appellee's summary disposition response, brief, and appendices, the appellee may omit these documents provided that appellee notes the omission prominently on the title page of the appellee's brief.
 - (D) A reply brief may be filed within 14 days after the appellee's brief is served on the appellant, and is limited to 5 pages, double-spaced, exclusive of tables, indexes, and appendices.
10. Record on Appeal. The Court of Appeals shall request the record on appeal from the trial court or tribunal clerk 28 days after jurisdiction has been confirmed and material filing deficiencies have been corrected. The trial court or tribunal clerk shall transmit the record as directed in MCR 7.210(G).
 11. Notice of Cases. Within 7 days after the filing of the appellee's brief, or after the expiration of the time for filing the appellee's brief, the clerk shall notify the parties that the case will be submitted as a "calendar case" on the summary disposition track.

12. Decision of the Court. The opinion or order of the panel shall be issued no later than 35 days after submission of the case to, or oral argument before, a panel of judges for final disposition.

This amended order will remain in effect until December 31, 2007~~6~~, during which time the Court of Appeals Work Group will monitor the expedited docket program. If, at any time during that monitoring process, it becomes apparent to the work group that procedural aspects of the program need to be modified, the group is encouraged to seek authorization from this Court to implement modifications. The work group will provide this Court with ~~written updates on the pilot program~~ a written report by November 1, 2007, for this Court's use in ~~before the one-year and eighteen-month anniversaries of the program's implementation. At the end of the two-year pilot period, this Court will evaluate~~ evaluating expedited processing of summary disposition appeals to determine whether the procedure will be discontinued, changed, or continued.

CAVANAGH, J., concurs in the extension.

Original Staff Comment: This is a new procedure requested by the Court of Appeals for the processing of appeals from orders granting or denying summary disposition. The new procedure applies to appeals filed after January 1, 2005. The procedure will be in effect for a two-year pilot period with ongoing monitoring by the delay reduction work group. That group will provide updates to the Court before the one-year and eighteen-month anniversaries of the pilot period. The group is authorized, during the two-year pilot period, to seek from the Court modification of the expedited docket procedures.

The transcript rate is authorized by statute. 2004 PA 328.

The Court of Appeals offered the following explanation of the expedited docket procedure:

The Court of Appeals estimates that summary disposition appeals make up about 50% of the Court's nonpriority civil cases. The procedure proposed by the Court's Case Management Work Group and announced in this administrative order is structured to facilitate disposition of eligible appeals within about 180 days after filing with the Court of Appeals. The work group's report can be accessed on the Court of Appeals website at <http://courtofappeals.mijud.net/resources/specialproj.htm>.

The procedure announced here is intended to apply to appeals arising solely from orders on motions for summary disposition. Orders that reference other issues between the parties will not be eligible for this track. If an eligible appeal is deemed to be inappropriate for the expedited docket, the Court can remove it, either on its own motion

or on motion of one or both of the parties. Such motions must be in the form prescribed by the Court of Appeals. See <http://courtofappeals.mijud.net/resources/forms.htm>.

The procedure encourages parties to evaluate whether a transcript of hearing(s) on the motion would be helpful on appeal. If little was stated on the record, or there is nothing to be gained from the transcript, it can be waived. In such cases, the appellant's brief (accompanied by the appellant's trial court motion, brief, and appendices) will be due within 28 days after filing the claim of appeal or entry of an order granting leave to appeal. If the transcript is ordered, it will be due within 28 days, with the appellant's brief due 28 days later. The appellee's brief (accompanied by its trial court motion, brief, and appendices) will be due 21 days from service of the appellant's brief. Motions to extend the time for filing briefs will be granted only on good cause shown and, generally, only for a maximum of 14 days. As a general matter, good cause will be limited to unexpected events that directly affect the ability to timely file the brief. When the motion is premised on work load considerations, at a minimum the motion should identify the cases and the courts in which filing deadlines are converging and specify the least amount of time that would be required to file the brief. Once briefing has been completed, the case will be referred to the Court's research attorneys for an expedited review and it will then be submitted to a panel of judges for disposition.

The staff comment is not an authoritative construction by the Court.

Staff Comment for amended order: The amendments require an appellant to order the transcripts or the preparation of transcripts may be waived by stipulation. Evidence of ordering the transcripts must be filed with the claim of appeal or application for leave to appeal. Provisions also are added to allow appropriate motions if ordered transcripts are not timely filed. If the transcript was not filed by the time the appellant's brief was served on multiple appellees, only one appellee needs to file an appropriate motion. The order on the motion will state the deadline for filing *any* outstanding briefs.

The amendments identify the trial court documents that must be appended to applications for leave to appeal and answers filed in response.

A party may file a motion to remove a case from the expedited summary disposition docket at any time, not just within a narrow time period. The amendments require the order of removal to state whether, and the deadlines by which, parties may file standard briefs.

The amendments provide that an appellant's brief will be due in 56 days from the claim of appeal or 28 days from the order granting leave to appeal. An appellee's brief will be due in 28 days from service of the appellant's brief.

The amendments allow an appellee to omit appendices if the documents were appended to the appellant's brief.

The amendments delete many filing deadlines for motion practice under the rule. Instead, pertinent provisions indicate that filing a motion most closely in time to discovery of the basis for it will maximize the likelihood that it will be granted.

The staff comment is not an authoritative construction by the Court.

Staff Comment for second amended order: After 18 months' experience with the expedited track, the Case Management Work Group has reviewed Court data indicating that the expedited track has attracted substantially more filings than had been projected and that only 29 percent of the expedited track cases are being disposed within 180 days of filing. Court data also indicates that roughly 30 percent of the cases on the expedited track are quantifiably more difficult cases than the Work Group had anticipated would be filed on the track.

In the early months of the program, the Court made a significant effort to discourage parties and attorneys from filing motions to remove cases from the track. Further, although the original and amended administrative order authorized the Court to administratively remove cases from the track at any time, in fact the Court rarely exercised that authority because of a perception that it would be unfair to remove a case that the parties and attorneys had succeeded in briefing on the shortened timeline. These two policies undoubtedly led to the large number of nonroutine appeals that continued on the track from filing to disposition.

Now, in an effort to continue to provide practitioners and parties with a properly functioning expedited track for processing *routine* appeals from orders granting or denying summary disposition, the work group proposes to modify the track to facilitate motions to remove so that cases that are inappropriate for the track can be diverted to the standard track as easily as possible. Further, the Court also will more actively exercise its existing authority to remove cases that are too complex for expedited processing.

As standards for determining whether a case should be removed from the track, the second amended administrative order states that parties and practitioners should focus on markers such as:

- Brief Length—one or more of the briefs are more than 25 pages in length.
- Lower Court Record—there are more than one to three moderately sized lower court files and more than 100 pages of transcript from the relevant motion hearing(s) and deposition(s).
- Issues Raised on Appeal—there are more than four issues and one or more of the issues involve (i) matters of first impression, including the first-time construction of a Michigan statute or court rule, and (ii) complex facts or law. Additional

issues may be allowed if they are merely separate factual challenges involving the same general area of law.

Further, the Court of Appeals notes that Case-Type Codes also offer some guidance in this area. Summary disposition appeals in cases that fall within one of the following case-type codes have often proven to be factually or legally complex, and thus may be inappropriate for the track: AA, AS, AW, CB, CD, CH, CL, CP, DE, MK, MM, MT, MZ, ND, NS, NZ, PZ, TI, and TV.

In more specific detail, the following changes are proposed in the second amended administrative order:

1. It will run for a period of 12 months from January 2007 through December 2007.
2. It will apply to cases filed on or after January 1, 2007. Note, however, that qualifying summary disposition applications for leave to appeal that are pending on January 1 can continue to be ordered onto the track by the panel if leave is granted.
3. The time for filing a claim of cross-appeal is changed from 14 days to 21 days to conform with MCR 7.207.
4. A motion to remove from the track may still be filed by any party, but no motion fee will be required. As noted above, the second amended administrative order recites specific criteria to be applied by parties and attorneys in making this request that are derived from case data gathered in the first 18 months of the experimental program. These criteria reflect quantifiable differences between routine and nonroutine appeals from orders on summary disposition motions. Parties and attorneys are urged to carefully apply these criteria so that nonroutine cases, which are inappropriate for expedited processing by the Court, are removed from the track as early as possible in each appeal.
5. Absent a party's motion to remove, the Court will exercise its administrative removal authority at any time, even if the determination cannot be made until after the parties have filed their briefs. This authority is essential to the Court's ability to manage the expedited track so that routine summary disposition appeals can be disposed within 180 days of filing.
6. The time for filing appellant's brief that was previously stated in section 8(A)(5), Transcript Production, has been replaced with a cross reference to the primary statement of time for filing in section 9(B)(1), concerning Briefs on Appeal.
7. Under the current administrative order, if appellant's brief is not filed within 7 days after the due date, and a warning order is issued under Sec. 9(B)(4), the order

must direct that the brief be filed within 14 days of the original deadline, more than 7 days of which have already elapsed by operation of the provision. The proposed amendment will provide appellant with 7 days from the date of the order in which to file the brief and avoid dismissal.

8. Briefs filed under the second amended administrative order are still limited to 35 pages. However, the Court of Appeals notes that case data gathered in the first 18 months of the experimental program indicates that appellants' briefs in the bulk of the nonroutine summary disposition appeals exceeded an average of 20-21 pages in length. The most complex appeals averaged 35 pages. Thus, one of the removal factors listed in section 7(B) is that the length of one or both briefs exceeds 25 pages. In the Court's view, a case that cannot be briefed in 25 pages is *usually* not appropriate for continued placement on the track.
9. Briefs on appeal must be accompanied by the filing party's trial court summary disposition documents. Appellee can omit these appendices if they were filed by appellant, but appellee must note the basis for the omission on the title page of its brief.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 9, 2006

Corbin R. Davis
Clerk